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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-718

MARGARET TOWNSEND,

Petitioner,

—against—

NASSAU COUNTY MEDICAL CENTER, *et al.*,

Respondents.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Certiorari is sought in this case on the ground that the Second Circuit held that unrebutted census data is insufficient to establish a prima facie case of discriminatory impact under Title VII, a holding squarely contrary to the rule in three other circuits and to *Dothard* v. *Rawlinson*, 97 S.Ct. 2720 (June 27, 1977). Respondents do not dispute our characterization of the decision below or of *Dothard*, and do not discuss the decisions of the Fifth, Eighth and Ninth Circuits. Respondents suggest instead a number of alternative arguments in support of the decision below; each of these arguments has already been rejected by prior decisions of this Court.

Frankly conceding that "petitioner performs her work in the blood bank laboratory in a competent manner,"[1] re-

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[1] Brief for Respondents in Opposition to Petition for a Writ of Certiorari (hereinafter "Brief in Opposition"), p. 4.

spondents urge that her dismissal for lack of a college degree was nonetheless proper because such a degree requirement is necessary to choose among *new* applicants. Regardless of whether the degree requirement could be validated for such new applicants under *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and its progeny none of those cases sanction the use of a job requirement to dismiss or reject an employee or applicant who is in fact qualified. On the contrary, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 426, 436 (1975) makes clear that even a job-related requirement cannot be used if there is another method of selecting qualified personnel "without a similarly undesirable racial effect." In this case, of course, just such an alternative to the college degree requirement exists for determining whether petitioner is competent to do the job at issue—her decade of exemplary performance at that very job.

Respondents' argument that the human risks involved justify the challenged requirement is misdirected. Respondents do not argue that petitioner herself poses any risks to her patients but in fact concede that she has more than satisfactorily performed all duties required of her since 1965, and that she continues to perform satisfactorily the duties of a Medical Technologist I, albeit at a lower salary.[2] Imposition of formal indicia of competence in no way serves to protect the public from increased risks. Its only effect is to lower petitioner's status and salary, a result wholly inconsistent with one of the purposes of Title VII, *i.e.*:

[2] Brief in Opposition, p. 4.

> . . . that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 806 (1973).

Respondents contend for the first time in this case that petitioner's statistical showing regarding the numbers of black and white college graduates was inadequate because there was no evidence regarding the race of persons holding Bachelor of Science degrees. In *Dothard* this Court expressly rejected a similar suggestion:

> The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact. If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made. 97 S.Ct. at 2727.

So far as we have been able to establish, no data exist as to the numbers of blacks and whites with Bachelor of Science degrees. Moreover, while a distinction based on a graduate's actual course of study may be appropriate for certain jobs, a distinction based on whether the graduate's degree is titled "Bachelor of Science" is palpably irrational in view of the fact that some schools, such as Harvard and Wellesley, give a Bachelor of Arts degree to biology and chemistry majors, while others, as the Massachusetts Institute of Technology, give a Bachelor of Science degree to English and humanities majors.

Respondents also urge that a job requirement cannot be unlawful under Title VII if some whites[3] too cannot meet the requirement. But in *Griggs* the high school requirement was one that could not be met by 66% of the whites, and in *Dothard* the height and weight requirements could not be met by 3% of adult males. Moreover, nothing in Title VII requires an employer to continue to apply to white or male applicants job requirements which cannot be applied to blacks or women, and the order of the district court in this case forbidding application of the degree requirement to petitioner left respondents free to cease using that requirement in other instances.

Respectfully submitted,

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[3] Respondents assert here, as in the court below, that three whites were also fired for want of a college degree. Brief in Opposition, pp. 4-5. The Second Circuit accepted this assertion, p. 26a. The record contains no evidence that whites were in fact dismissed, as Mrs. Townsend was. However, even if that fact were true, it is statistically insignificant and may only be demonstrative of respondents' overwhelmingly white workforce.

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